

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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October 12, 2011

LEGEND:

Taxpayers =

Taxable Year =

Date 1 =

Date 2 =

Date 3 =

Form =

Dear :

This letter responds to your letter dated April 11, 2011 requesting an extension of time to make an election under § 172(b)(1)(H) of the Internal Revenue Code. In particular, Taxpayers request that Taxpayers be granted additional time to make the election under § 6081 of the Internal Revenue Code and §301.9100-1 of the Income Tax Regulations.

STATEMENT OF FACTS

We rely on the information provided and the representations made in Taxpayers' submissions dated April, 11, 2011.

Taxpayers sustained a net operating loss ("NOL") in Taxable Year. Taxpayers represent that they have no formal business, accounting or finance background or experience. Accordingly, Taxpayers relied on a public accounting and consulting firm

("accounting firm") for planning and preparing their Federal tax returns, as well as for general accounting, auditing, and business tax and consulting services.

During Taxable Year, Taxpayers met with the accounting firm, which recommended making the election pursuant to § 172(b)(1)(H) to carry back an NOL from Taxable Year to the fifth taxable year preceding Taxable Year. Taxpayers agreed and directed the accounting firm to take the requisite steps to carry back Taxpayers' NOL for Taxable Year to the fifth preceding taxable year.

Taxpayers' original due date for their Federal tax returns for Taxable Year is Date 1. Taxpayers extended their due date to Date 2, which is six months from Date 1, and the accounting firm electronically filed Taxpayers' tax returns on Date 2. However, the accounting firm did not make the election to apply the extended carryback period under § 172(b)(1)(H). On Date 3, while preparing Form for Taxpayers, the accounting firm discovered that the § 172(b)(1)(H) election was not made for Taxpayers. On April 11, 2011, the Taxpayers filed this private letter ruling request.

LAW AND ANALYSIS

Section 172(a) allows a deduction equal to the aggregate of the NOL carryovers and carrybacks to the taxable year. Section 172(b)(1)(A)(i) provides that an NOL for any taxable year generally must be carried back to each of the 2 years preceding the taxable year of the NOL.

Section 172(b)(1)(H)(i) permits a taxpayer to elect to carry back its applicable NOL to 3, 4, or 5 years preceding the taxable year of the applicable NOL. Section 172(b)(1)(H)(ii) provides that the applicable NOL means the taxpayer's NOL for a taxable year ending after December 31, 2007, and beginning before January 1, 2010.

Section 172(b)(1)(H)(iii) provides that the election under § 172(b)(1)(H) is required to be made in a manner prescribed by the Secretary, and must be made by the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009.

Section 6081(a) provides that the Secretary may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by the Internal Revenue Code or by Income Tax Regulations. Except in the case of taxpayers who are abroad, no such extension shall be for more than 6 months.

Section 1.6081-1(b)(1) provides that, in part, a taxpayer desiring an extension of the time for filing a return, statement, or other document shall submit an application for extension on or before the due date of such return, statement, or other document.

Section 301.9100-1(a) provides, in part, that the regulations under §§ 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. It also provides that the regulations under §§ 301.9100-1 and 301.9100-2 provide an automatic extension of time to make certain statutory elections.

Section 301.9100-1(b) defines (A) a statutory election as an election whose due date is prescribed by statute, and (B) a regulatory election as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner in exercising the Commissioner's discretion may grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-2(b) provides a taxpayer with an automatic extension of 6 months from the due date of a timely filed return (excluding extensions), provided the taxpayer takes "corrective action" within that 6-month period. Under § 301.9100-2(b), a taxpayer cannot extend the due date of a statutory election beyond the extended due date of the return on which the election should have been made.

Section 301.9100-3 provides the standard the Commissioner of Internal Revenue uses to determine whether to grant an extension of time to make regulatory elections.

Taxpayers' request for an extension of time was untimely. Section 1.6081-1(b)(1) provides that "[a] taxpayer desiring an extension of the time for filing a return . . . shall submit an application for extension on or before the due date of such return[.]" Taxpayers did not submit an application for an extension on or before the due date of the return, Date 1, and therefore, any application submitted past that due date is untimely. Moreover, unless Taxpayers were abroad, they cannot obtain extensions under § 6081 beyond six months from the original due date for filing the return. See § 6081(a); Rev. Rul. 93-85, 1993-2 C.B. 297. As there is no indication that Taxpayers were abroad, Taxpayers cannot obtain a § 6081 extension to any date beyond six months from Date 1, which is Date 2. As the requested extension is to a date after Date 2, § 6081 does not authorize the Secretary to grant such an extension.

The due date for an election under § 172(b)(1)(H) is expressly prescribed by the statutory provision, and accordingly, the election is by definition a statutory election within the meaning of § 301.9100-1(b). As a statutory election, § 301.9100-2 applies to determine relief for late elections under § 172(b)(1)(H). Under § 301.9100-2, Taxpayers

would need to take corrective action within 6 months after the unextended due date for filing their return for Taxpayers' last taxable year beginning in 2009. In this case, Taxpayers did not do so. Section 301.9100-1 does not provide an extra extension of time to make a statutory election separate from the automatic extension of time to make certain statutory elections provided in § 301.9100-2.

Consequently, we are unable to grant Taxpayers' request for additional time to make an election under § 172(b)(1)(H).

DISCLAIMERS

Except as provided above, no opinion is expressed as to the Federal tax treatment of the transaction under any other provisions of the Internal Revenue Code and the Income Tax Regulations that may be applicable or under any other general principles of Federal income taxation. Neither is any opinion expressed as to the tax treatment of any conditions existing at the time of, nor effects resulting from, the transaction that are not specifically covered by the above ruling.

This ruling is directed only to Taxpayers. Section 6110 (k)(3) provides that it may not be cited as precedent. Pursuant to the Power of Attorney submitted by Taxpayers, a copy of this letter will be sent to Taxpayers' authorized representatives.

Sincerely,

William A. Jackson
Branch Chief, Branch 5
Office of Associate Chief Counsel
(Income Tax and Accounting)